



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 565 of 2009

**IN THE MATTER OF SECTIONS 3,26(4), 65,70,71,72,74,75,76,77(1) 77(2) (a), 77(4), 82 AND 84(1)
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTIONS 70, 71, 72, 74, 75, 76, 77(1) 77(2) (a), 77(4) and 82 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE PROCEDURE RULES, 2006**

AND

IN THE MATTER OF THE PENAL CODE CAP 63 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 75 OF THE LAWS OF
KENYA**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KIBERA CRIMINAL CASE
NO. 3975 OF 2009**

REPUBLIC

-vs-

**POLYCAP ODHIAMBO OYARE, GELLAS WAFULA WALEKWA, DAVID KOMEN KANDIE
AND JEREMIAH WYCLIFFE MAKOKHA**

BETWEEN

POLYCAP ODHIAMBO OYARE 1ST PETITIONER
GELLAS WAFULA WALEKWA 2ND PETITIONER
DAVID KOMEN KANDIE 3RD PETITIONER
JEREMIAH WYCLIFFE MAKOKHA 4TH PETITIONER

AND

THE CHIEF MAGISTRATE’S COURT AT KIBERA 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
THE COMMISSIONER OF POLICE 3RD RESPONDENT

RULING

POLYCAP ODHIAMBO OYARE, GELLAS WAFULA WALEKWA, DAVID KOMEN KANDIE and JEREMIAH WYCLIFFE MAKOKHA who I shall henceforth refer to as ‘the petitioners’ seek the following orders against **THE CHIEF MAGISTRATE’S COURT AT KIBERA, THE ATTORNEY GENERAL and THE COMMISSIONER OF POLICE**, who I shall to as ‘the 1st, 2nd and 3rd respondents’ respectively:

- *an order of stay of the proceedings in CR. CASE NO. 3975 OF 2009 REPUBLIC –VERSUS- POLYCAP ODHIAMBO OYALE, GELLAS WAFULA WALEKWA, DAVID KOMEN KANDIE and JEREMIAH WYCLIFFE MAKOKHA pending the hearing and determination of their Petition.*
- *that they be admitted to bail on such terms as this court may direct.*

They also pray for costs.

They rely on the grounds inter alia that:

- *They were arrested on Saturday 12/9/ 2009 by Police officers attached to Kenyatta National Hospital police post and were held in custody until 14/9/2009 when they were arraigned and jointly charged before the Kibera Law courts in the aforementioned matter with three counts of the offences of robbery with violence.*
- *They denied the offences and were not released on bail.*
- *The prosecution is scheduled to commence before the 1st Respondent on 30/102009.*
- *Their fundamental rights as guaranteed by Sections 70,71,72,73,74,75,76,77(1)77(2)(a),77(4) and 82 of The Constitution of Kenya have been violated by the preferring of the said charges against them.*
- *If the 2nd Respondent proceeds with their prosecution it will amount to perversion of the course of justice by perpetuating, condoning and endorsing the illegalities of the 2nd and the 3rd Respondents.*
- *The institution and proceeding with the said prosecution is oppressive and vexatious and therefore an abuse of the process of the court.*

It is common ground that there exists a case in the subordinate court against these petitioners. Indeed they seek orders to stay those proceedings. The issue for my determination therefore, is whether by filing a petition in this court in the manner that they did, they are properly before this court.

It was the submission of Miss Nyongesa, the learned State counsel who appeared for the respondents that the whole cause is fatally defective in light of rules 25 and 26 of the Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedure Rules, 2006; that rules of procedure need to be adhered to, and she relied on **Rael Chelagat Chepkonga vs The Attorney General HCCMisc. Application No. 384 of 2008** as well as on the case of **Talib Abubakar v Commissioner of Police & The Attorney General HCC Petition No. 732 of 2008**, in which the courts in both instances reiterated that rules of procedure must be adhered to, and that one can only petition directly to the High court where there is no pending case in the subordinate court. All in all, she was of the view that they should have raised issues for framing by the trial Magistrate.

Rule II applies only where there is no pending case – my first authority will bear me out.

Mr. Tiego, who appeared for the applicants' was however of a different view and it was his submission that his clients' petition is not defective as it is not only based on Chapter 5 of the Constitution of Kenya ('the Constitution'), but is also based on sections 3, 26(4) and 65(c) of the Constitution, which stipulate that:

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It was also his submission that section 3 above is clear in that it states that the Constitution shall be the supreme law of the law and that anything contrary thereto shall be null and void, and it was thus his contention that this would include subsidiary legislation such as the aforementioned Rules of 2006, however he did not show the inconsistencies

We could have moved the court under rules 2, 3 and 4 of the said Gicheru Rules.

He seemed to lay heavy reliance on rule II of the said Rules in support of his contention that they were properly before this court. The said Rule provides that '**where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court**'.

Rules 24 – 26 thereof predicate a situation where the contraventions which a party seeks to challenge are clear on the charge sheet. It wouldn't call for any affidavit evidence and is basically for framing issues of law only. In our case, we have evidence to show that our Constitutional rights have been and continue to be contravened.

Rule II is not subject to rules 24-26. Her first authority – existence of rule II were never brought to the Judges attention. In her second authority – applicability of rule eleven wasn't an issue. Section 65 of the Constitution wasn't invoked in both cases.

In the case of her last authority which is also distinguishable, there was no allegation of breach of fundamental rights, hence the dismissal. I plead Section 84 of the Constitution. These issues weren't brought to the attention of the trial Magistrate at the first instance as they weren't purely based on contravention of fundamental rights.

He relied on the case of **Christopher N. Murungaru v Kenya Anti Corruption Commission & another HCCMisc. Application No. 54 of 2006**.

It was also his submission that the aforementioned Rules are made pursuant to section 84(6) of the Constitution and that they cannot in the circumstances fetter Section 84(1) and (2) of the said Act. He relied on the case of **Joram Mwenda Guantai v The Chief Magistrate Nairobi CA (Nrb) 228/2003** and on **Republic vs The Attorney General & another Re Kipng'eno Arap Ng'eny HCCMisc. Application No.**

24. Where in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) of the Constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court in Form E set out in the Schedule to these Rules.

25. Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.

26. If the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application where upon the court shall frame the question to be determined by the High Court in Form F set out in the Schedule to these Rules.

Miss Nyongesa therefore prays that their preliminary objection be upheld. Mr. Tiego urged the court to disallow it with costs.

RULES FROM KENYA GAZETTE SUPPLEMENT NO. 7

2. Unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under section 65 of the Constitution, shall do so by way of Originating Notice of Motion (hereinafter referred to as “the Motion”)

3. The Motion shall be as set out in Form A in the Schedule to these Rules.

4. The Motion shall state the concise grounds for the application, and shall be supported by the applicant’s affidavit.

Dated and delivered at Nairobi this 30th day of October 2009.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the petitioners -

For the respondents -